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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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**No. 75-1511**

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LARRY J. WILLIAMS,
*Petitioner,*

vs.

SOUTHERN UNION GAS COMPANY,
*Respondent.*

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Southern Union Gas Company, the Respondent, hereby opposes the petition of Larry J. Williams that a writ of certiorari issue to review judgment of the United States Court of Appeals for the Tenth Circuit entered herein on January 21, 1976.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 529 F.2d 483 (1976). The opinion of the District Court is unreported but the Findings of Fact and Conclusions of Law of the District Court are appended to the opinion of the Court of Appeals.

## JURISDICTION

Respondent contends that the Court does not have jurisdiction of this matter because the United States District Court for the District of New Mexico lacked subject matter jurisdiction of the action in the first instance for the reason that the action was filed subsequent to the expiration of the time provided for filing in 42 U.S.C. Section 2000e-5 (f) (1).

## QUESTIONS PRESENTED

1. Whether the period for filing the present action had expired before filing so as to deprive the trial court of subject matter jurisdiction.

2. Whether the decision below was correct in treating the numerical quantity of Petitioner's failures to work as one of several factors rather than the sole test in determining whether Petitioner's failure to work caused undue hardship on his employer's business.

3. Whether the Tenth Circuit correctly decided that the issues before the trial court were basically factual issues, the resolution of which can only be reversed if clearly erroneous pursuant to Federal Rule of Civil Procedure 52.



## STATEMENT OF CASE

### Preliminary Statement

This case involves a claim of religious discrimination under the Civil Rights Act of 1964 in connection with the firing by Southern Union Gas Company ("Southern Union") of Larry Williams ("Williams"). Williams was fired because he refused to work on an emergency pipeline construction project in a remote section of northern New Mexico on Saturday, October 3, 1970, the day on which the pipeline had to be completed. Williams refused to report to work on the ground that his religion, the Worldwide Church of God, forbade working on the Sabbath, sundown Friday to sundown Saturday. Williams further took the position that only he could determine whether an emergency situation existed.

However, Williams knew from the date of his hiring in 1962 that all Southern Union employees were required to be available to work seven days a week so that continuous service could be provided to the public. It was critical to complete the pipeline in question on Saturday, October 3, 1970, and Williams knew that he might have to work on Saturday as early as Wednesday, September 30, 1970, when he asked for and received the following day off to participate in a special religious holiday of his church. The presence of Williams, or his supervisor, who had been scheduled for six months to commence his vacation on October 3, 1970, was required on October 3, 1970. It was under these circumstances that Williams refused to work and was fired.

Williams filed a complaint with the EEOC regarding the firing, and after EEOC compliance efforts failed Williams filed a private action against Southern Union. The trial court heard the case although Southern Union con-

tended that the court lacked subject matter jurisdiction because the time provided in the Civil Rights Act of 1964 for filing the action had run before the action was filed. The trial court ruled that Southern Union had complied with the relevant provisions of the Civil Rights Act of 1964 by reasonably accommodating Williams' religious needs; that for Southern Union to have accommodated Williams in the emergency instance in question would have placed an undue hardship on Southern Union in the conduct of its business operations and that Southern Union did not discriminate against Williams in his religious beliefs.

Williams appealed the decision to the United States Court of Appeals for the Tenth Circuit, but the trial court's decision was affirmed on the basis that the issues before the trial court were basically issues of fact, and the trial court's resolution of the matter could not be overturned unless it was clearly erroneous which it was not. Southern Union's cross-appeal on the basis that the District Court lacked subject matter jurisdiction was denied. Williams now seeks issuance of a writ of certiorari to the Court of Appeals for the Tenth Circuit.

Petitioner refers to *Parker Seal Co.* v. *Paul Cummins*, No. 75-478, October Term, 1975, and implies that purported similarities between *Parker* and the present case justify granting certiorari herein. However, the case at bar consists of its own unique facts which are entirely different from *Parker,* and its own legal issues which are significantly different from and fewer than *Parker.* The facts and legal issues in the present case alone must be the basis for granting or denying certiorari.

**Chronology of Events**

In July, 1962, Southern Union hired Larry Williams as a dehydrator repairman. At that time Williams was informed that although Southern Union employees were scheduled to work five days a week only, it was necessary for all employees to be available for work seven days a week, twenty-four hours a day. The reason for the full time availability was that Southern Union was a public utility obligated to provide continuous gas service to the public.



Until 1969, Williams belonged to no church. In 1969 he joined the Worldwide Church of God. Williams advised his superior of his conversion and its observance of the sundown Friday to sundown Saturday Sabbath, but was told he could not be guaranteed he would never be called to work on Saturday. Williams was not regularly scheduled to work on Saturday at the time of his conversion or at the time of his firing.

Up to October 3, 1970, Williams was never required to work on a Saturday. On October 2, 1970, Williams was ordered to work on Saturday, October 3, 1970, to complete a pipeline which would temporarily supply all Southern Union customers while an alternate line was improved. Completion of the pipeline on that date was of critical importance because, if delayed, the onset of winter would have required postponing the project until after winter, leaving customers with insufficient supplies for almost one year. The presence of Williams, who in 1970 was the production repairman, or his supervisor, who had for six months been scheduled to commence his vacation October 3, 1970 was required on the project. Earlier in the week, on Wednesday, September 30, Williams had requested and been given one day off to participate in a special religious holiday of the Worldwide Church of God. Williams was advised on Wednesday, September 30, that the pipeline had to be completed by Saturday, October 3, and that he might have to work on Saturday.

The pipeline was not completed on Friday, October 2, but Williams refused to report for work as required on October 3, and was fired by his superior who stayed to finish the project.

On March 26, 1971, Williams filed a complaint with the EEOC charging Southern Union with religious discrimination.

On May 30, 1973, EEOC advised Williams by letter that its compliance efforts were unsuccessful, and that he could bring a private action if he desired. The letter advised him that, if he did wish to sue, he could request a "Right-to-Sue" letter, after receipt of which he had to file his action in 90 days.

On December 6, 1973, a Right-to-Sue letter was issued by the EEOC to Williams, and on March 6, 1974, Williams filed suit in the United States District Court for the District of New Mexico.

On December 10, 1974, the District Court entered its ruling against Williams.

Williams appealed the District Court's decision on the similar grounds that Southern Union had not met its burden of showing of undue hardship by reason of Williams' failure to work, and that a one-time failure to work could not constitute as a matter of law an undue hardship on any employer. Southern Union cross-appealed on the lack of jurisdiction issue raised at trial. On January 21, 1976, the Tenth Circuit rejected Williams' appeal stating that the issues presented to the trial court were basically factual issues, and the decision of the trial court could therefore not be overturned because it was not clearly erroneous. Southern Union's cross-appeal was also denied.

On June 15, 1976, Williams filed his petition for certiorari.



## REASONS FOR DENYING THE WRIT

### 1. The District Court Did Not Have Subject Matter Jurisdiction Of This Case In The First Instance Because It Was Filed After The Time Provided For Filing In 42 U.S.C. §2000e-5(f)(1).

42 U.S.C. §2000e-5(f)(1) provides in pertinent part as follows:

> "If within 180 days from the filing of such a charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved."

This statute has been interpreted to place a limit on the time for an action to be filed of 270 days from the filing of a complaint with the EEOC [*Equal Employment Opportunity Commission* v. *Louisville & Nashville Railroad Co.*, 368 F.Supp. 633, 636 (N.D.Ala. 1974); *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, 502 F.2d 153 (4th Cir. 1974); *Genovese* v. *Shell Oil Co.*, 488 F.2d 84 (5th Cir. 1973)] and a limit on the time to file an action of 90 days after the complainant is notified of the EEOC's failure to enter a compliance agreement [*Equal Employment Opportunity Commission* v. *Cleveland Mills Co., supra; Genovese* v. *Shell Oil Co., supra; Goodman* v. *City Products*, 425 F.2d 702 (6th Cir. 1970); *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968)].

Several Circuit Court decisions have recently reached the same conclusion with respect to the 270 or the 90 day limitation period of 42 U.S.C. §2000e-5(f)(1). The Second Circuit in *Weise* v. *Syracuse Univ.*, 522 F.2d 397 (2nd Cir. 1975), held that the statute requires the EEOC to send a notice at the end of the 180 day period after the filing of the charges which notice comn ences the running of the 90 day period. The court said:

> "If the EEOC dismisses the charge, or if within 180 days of the filing the Commission has neither effected conciliation nor instituted a civil action, it is to notify the aggrieved party, who has 90 days after the giving of such notice to commence an individual civil action." 522 F.2d at 412.

See also: *De Matteis* v. *Eastman Kodak Co.*, 511 F.2d 306, modified in rehearing in other respects, 520 F.2d 409 (2nd Cir. 1975); *Cleveland* v. *Douglas Aircraft Co.*, 509 F.2d 1027 (9th Cir. 1975); *Equal Employment Opportunity Commission* v. *E. I. Du Pont de Nemours & Co.*, 516 F.2d 1297 (3rd Cir. 1975).

Under the authority of these cases, the limits for Petitioner to file his action had expired depriving the District Court of jurisdiction of the case. A period of 1,057 days elapsed from the filing of charges by Williams with the EEOC to the filing of the complaint in Federal District Court; a period of 281 days elapsed from the notification of Petitioner that EEOC conciliation efforts had failed to the filing of the complaint in Federal District Court.

42 U.S.C. §2000e-5(f)(1) has also been interpreted so as not to place such time restrictions on the filing of the action in Federal District Court. *Tuft* v. *McDonnell Douglas Corporation*, 517 F.2d 1301 (8th Cir. 1975), *cert. den.* 44 U.S.C.A. 3394 (Jan. 12, 1976), and the Tenth Circuit relied upon *Tuft* in denying Southern Union's cross-appeal based on Petitioner's failure to file within the required 270 or 90 day time limits.



The application of the *Tuft* rationale herein has resulted in sanctioning the manipulation by the EEOC and complainant of time limits which are clearly provided by statute. By using the device of an informal-formal, or two-letter notification, the EEOC can make indefinite the limit on filing an individual action. In addition to thwarting the provisions of the statute, the ruling allows the traditional problems addressed by limitations statutes to occur, absence of witnesses or reliance on dimmed memories of witnesses and a hardship on defendants to defend matters which appear to be closed by the passage of time and inaction.

Accordingly, the Court should deny the writ of certiorari on the basis that the Federal District Court did not have subject matter jurisdiction of this case in the first instance because Petitioner did not file his action within the statutorily prescribed time limits. At the very least, the Court, if it grants certiorari should also entertain the jurisdictional question presented here upon which the Circuit Courts of Appeal have issued conflicting opinions.

**2. The Decision Below Was Correct In Treating The Numerical Quantity Of The Failures To Work As Only One Factor In Determining Whether There Was Undue Hardship On The Employer's Business.**

Petitioner advances as his first reason for issuing the writ the unsupportable premise that a single failure to work cannot as a matter of law constitute an undue hardship for an employer. Petitioner's premise is faulty in several respects. Each case turns on its own unique facts. A one-time failure to work by an individual with certain highly

developed skills or special training at a crucial time might literally destroy a business. A one-time failure to work involving a different individual under different circumstances might result in slight or no harm to a different employer. It cannot be maintained that a one-time failure to work cannot constitute an undue hardship to any employer. The trier of fact in any case should not simply count the number of failures to work, as Petitioner would have, but must determine the impact of an employee's failure to work based on all the circumstances, including the nature of the work to be done, the importance of the work to the company, the position, skill and training of the individual, the size of the employer and other such factors as may be present. A rule of law that a one-time failure to work cannot constitute undue hardship is based upon such faulty reasoning that even if accepted, it would not long stand.

If accepted, Petitioner's premises would also result in a totally unfair rule. Petitioner asks the Court to substitute an unreasoning, automatic response for a reasoned, fact by fact analysis which is the very basis of a fair decision. Failing to take into account the innumerable factors which constitute each conflict between employee and employer can only lead to decisions which will offend the sense of fairness of all parties involved and ultimately undermine the law involved.

Petitioner's apparent reason for advancing the dubious proposition that a one-time failure to work cannot as a matter of law constitute undue hardship is to induce another court to weigh the evidence presented below and perhaps come to a different resolution of the issue than the trial court. In effect, Petitioner seeks by this petition a trial *de novo* to which he is not entitled. The evidence in a given case may show one failure to work, two failures to work or one hundred failures to work, but it is in the realm



of the trial court to weigh the evidence and determine if the failure or failures to work cause undue hardship to the employer. This determination is a factual matter which is not to be upset in the appellate courts unless clearly erroneous.

Petitioner mischaracterizes the decision below as one that will deny the American citizen's basic right to work and will work a hardship on those nearing retirement or pension. A one-time failure to work will not automatically deprive an individual of work, whether he was nearing retirement or not. The numerical quantity of the failure or failures to work, in the context of the individual's skills and position and the urgency of the work required will be considered to determine if there has been an undue hardship on the employer justifying termination. Conversely, an employer does not have to deal with the principle that an employee's first failure to work, no matter what its impact, will never justify termination of the employee.

### 3. The Tenth Circuit Court Of Appeals' Review Of The Issues Of "Reasonable Accommodation" And "Undue Hardship" As Factual Is Correct.

The scope of review undertaken by the Tenth Circuit was proper and correct because the issues which the District Court faced below were essentially factual in nature. In particular, the findings which Petitioner questions, that there was *reasonable accommodation* of Williams' religious beliefs and that further accommodation would have caused *undue hardship* to Southern Union are factual.

Whether an act is reasonable or unreasonable is a question encountered often by laymen in all walks of life and involves the application of knowledge obtained from nature and developed by experience to a particular situation. The

law correctly recognizes that the reasonableness of an act is a factual question in numerous areas. For example, in the law of tort the determination whether an alleged tortfeasor acted negligently or reasonably can be disturbed on appeal only if it is clearly erroneous. See e.g. *J. P. (Bum) Gibbins, Inc.* v. *Utah Home Fire Ins. Co.*, 202 F.2d 469 (10th Cir. 1953); *United States* v. *Chicago, R.I. & P. Ry. Co.*, 171 F.2d 377, 379 (10th Cir. 1948); *United States* v. *Sommers*, 351 F.2d 354 (10th Cir. 1965). In *United States* v. *One 1955 Model Ford 2-Door Coach*, 261 F.2d 125 (5th Cir. 1958), which concerned federal statutes, the issue of reasonableness was also treated as factual. *Ford* involved an attempt by a finance company to have remitted an automobile forfeited because of Federal liquor law violations, and the issue was whether an inquiry by the finance company of federal authorities regarding liquor law violations by the purchaser was timely. The applicable statute did not specify a time but had been interpreted to require inquiry in a "reasonable" time. The Fifth Circuit reversed the trial court's finding of fact that the finance company's inquiry had been made in a reasonable time. It said:

> "In that view, the period of nearly seven months elapsing between June 15, 1956, and January 10, 1957, is an unreasonably long time as a matter of law. The District Court's implied finding that it was reasonable is 'clearly erroneous.' Fed. Rules Civ. Proc. Rule 52(a), 28 U.S.C.A." 261 F.2d at 128.

The Fifth Circuit clearly considered the finding as to reasonableness a factual issue, and therefore applied the clearly erroneous rule, as did the Tenth Circuit in the present case.

The issue whether there was "undue hardship" is also a factual issue. The most persuasive authorities for this proposition are those cited by Petitioner. Petitioner states:



> "In the case of *Cummins* v. *Parker Seal* . . . the court overturned as 'clearly erroneous' the district court finding that accommodation of Cummins' beliefs would have been an 'undue hardship' on Parker Seal Company.
>
> In the case of *Draper* v. *United States Pipe & Steel Foundry Co.*, 527 F.2d 515 (1976) another divided panel of the Sixth Circuit overturned as clearly erroneous a similar finding of a district court." Williams' Petition for Certiorari at pp. 13-14.

The Tenth and Sixth Circuits are thus in agreement, by Petitioner's own admission and authority, that the issue of "undue hardship" is a factual one. The same treatment of the issue is found in other areas of the law. *Shapiro* v. *Rubens*, 166 F.2d 659, 665-66 (7th Cir. 1948) (finding against undue influence by son in execution of father's will affirmed as not clearly erroneous).

Petitioner's argument that these issues are legal is based solely on the fact that the District Court, "by adding citations of law, transformed its last three 'findings of fact' into 'conclusions of law.'" Williams' Petition for Certiorari at p. 13. The reason for Petitioner's confusion is that Section 701(j) of the Civil Rights Act of 1964, as amended, contains the terms "reasonably accommodate" and "undue hardship". Thus, the statement of whether the law has been violated or complied with necessarily will include a reference to these trems. But such reference does not transform the findings of fact into conclusions of law or vice versa. Each remains subject to a separate and distinct determination and process.

Petitioner's reliance on *Baumgartner* v. *United States*, 322 U.S. 665 (1944), to support its contention that the Tenth Circuit applied the wrong standard in reviewing the

case at bar is totally misplaced. The issue in *Baumgartner*, which involved setting aside a certificate of naturalization of an alleged Nazi sympathizer, was whether the United States Supreme Court was bound by the concurrent findings of two lower courts. The Court in *Baumgartner* found that on appeal it could review facts found by both the trial and appellate courts on authority of *Beyer* v. *LeFevre*, 186 U.S. 114 (1902) which held:

> "Passing to the second question, we premise by saying that it is well established that when the trial and the appellate courts agree as to the facts established on the trial, this court will accept their conclusion, and not attempt to weigh conflicting testimony (cite omitted) . . . At the same time there has always been recognized the right and duty to examine the record, and if it finds that the conclusions are *wholly unwarranted* by the testimony it will set the verdict or report aside and direct a re-examination." 186 U.S. at 119. (Emphasis added).

See also: Moore's Federal Practice, *Effect in Supreme Court of Concurrent Findings of Fact of Two Lower Courts —The Two Court Rule*, §52.12 at 2762 et seq.

*Baumgartner* is clearly not applicable and does not even purport to give direction to the Circuit Courts of Appeal on the application of Federal Rule of Civil Procedure 52. However, to the limited degree that the *Baumgartner* holding may be extended to the present case, *Baumgartner* supports the Tenth Circuit's decision that an appellate court may not reject the factual findings of a trial court unless the factual findings are wholly unwarranted, or in the words of Federal Rule of Civil Procedure 52 "clearly erroneous".



Petitioner is likewise incorrect in his contention that the courts below are divided regarding whether the issues of "reasonable accommodation" and "undue hardship" are factual or legal. The very cases cited by Petitioner belie his statement and show consistent treatment of the issues as factual. The Sixth Circuit in *Cummins, supra,* treated as factual and reversed as clearly erroneous this finding:

> "This Court finds from the entire record herein that the defendant made a reasonable accommodation to the plaintiffs' religious needs and that no further accommodation could be made at the time of the defendant's dismissal from employment without creating an undue hardship on the employer's business." 516 F.2d at 546.

In *Draper* v. *United States Pipe & Foundry Co.*, 527 F.2d 515, 519 (1976), the Court treated as factual and reversed as clearly erroneous the finding that:

> "Rather, the evidence preponderates in favor of a finding that the defendant attempted to reasonably accommodate the plaintiff in his religious convictions, but when such accommodations were found by the plaintiff to be unacceptable, the defendant was unable to further accommodate the plaintiff without modifying its operations in an economically disadvantageous manner and without undue hardship in the conduct of its business." 527 F.2d at 529.

Petitioner is able to claim that the Eighth Circuit in *Hardison* v. *Transworld Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975) did not treat the issues as factual only by misstating the case. Petitioner contends that the Eighth Circuit never discussed the issue it raised—"whether the finding below that defendants had fulfilled their duties to attempt reasonable accommodation of Hardison's religious practices, short

of undue hardship, were clearly erroneous." 527 F.2d at 37. It is clear that the Eighth Circuit applied the "clearly erroneous" doctrine. In discussing evidence relating to TWA hardship, the Court said "We think the District Court erroneously drew the inference of undue hardship from such testimony." 527 F.2d at 40. The Court also said in the sentence immediately preceding the quotation cited in petitioner's brief,

> "It does not appear from the record, however, that TWA gave any serious consideration to the reasonableness of such an alternative or to the extent of the burden it might create upon the business of TWA." 527 F.2d at 41.

These statements, taken together with the court's own framing of the issue, indicate that the Eighth Circuit did follow the clearly erroneous doctrine in *Hardison* and necessarily recognized the issues as factual.

Petitioner wrongly claims that the following cases identify the reasonable accommodation and undue hardship issues as "legal": *Dixon* v. *Omaha Public Power District*, 385 F.Supp. 1382 (D.Neb. 1974), *Johnson* v. *U. S. Postal Service*, 364 F.Supp. 37 (N.D.Fla. 1973) and *Jordan* v. *N. Carolina National Bank*, 399 F.Supp. 172 (W.D. N.C. 1975). These cases do not purport to discuss whether the issues of reasonable accommodation and undue hardship are matters of fact or law. The cases do include conclusions of law on these issues. But, as stated above, an inclusion of statements regarding reasonable accommodation and undue hardship will likely appear in any trial court's conclusions of law because these terms appear in the Civil Rights Act of 1964. However, this does not exclude a separate finding of fact on these issues, and in these cases are statements indicating that the court did enter such factual findings. In *Dixon*, Finding of Fact No. 6 states, in part:



> ". . . the defendant had accommodated the plaintiff on one or two occasions when he had declined to work beyond his regularly scheduled hours on a Friday evening, *but this had presented no undue hardship to the defendant . . .*" 385 F.Supp. at 1384. (Emphasis added).

The *Johnson* decision also indicates that the determination of reasonable accommodation is factual although the discussion occurs under the court's conclusion of law. The court says,

> "The simple fact which places this factual situation squarely within the exception, which is not contested, is that the Chattahoochee Post Office operates on a limited scale with a minimal number of employees and facilities. The requisite manpower does not exist to accommodate plaintiff." 364 F.Supp. at 42.

In *Jordan* also, the court made the following findings with respect to a co-worker of plaintiff:

> "Ms. Woods' position is that she absolutely cannot work on Saturday; *the defendant has successfully accommodated her religious needs without a hardship on the bank.*" 399 F.Supp at 177. (Emphasis added).

A close examination of the cases cited to the Court by Petitioner and the case at bar reveals that there is a remarkably consistent recognition and treatment of the issues of "reasonable accommodation" and "undue hardship" as factual. The appearance of these terms in conclusions of law results from their inclusion in the language of the Civil Rights Act of 1964 and does not make obligatory a determination that the issues are legal or mixed legal and factual. Hence, the Tenth Circuit's decision that the issues are factual is in line with other decisions and there is no inconsistency to be resolved by the Court.

Petitioner cites the Tenth Circuit case, *Stafos* v. *Jarvis*, 477 F.2d 369 (10th Cir. 1973), for the general proposition that the "clearly erroneous" rule does not apply on questions of law or mixed questions of law and fact. However the dictum quoted from *Stafos* is of no probative value here because *Stafos* is a bankruptcy case in which the issue was whether the Kansas constitutional provision for homesteads allowed the bankrupt to exempt certain acreage as farming land. Other cases cited by Petitioner for the same general proposition are inapposite because they do not pertain to solely factual issues.

**4. The Case Is Limited To Its Facts And Will Have No Broad Application.**

This case will be limited to its facts because it involves the failure to work in an emergency situation for religious reasons. Most religions, including the Jewish and Christian religions hold in this regard that believers may respond to emergency situations on the Sabbath without violating religious rules. Since these religions predominate in the United States, the question in this case will not arise for a great number of citizens. It is unlikely that the issue will present itself even to members of the Worldwide Church of God because that sect also recognizes that work can be performed on the Sabbath in emergency situations. Only those persons who feel, as Petitioner did, that he alone makes the determination whether an emergency exists in his employer's business will be affected by this decision. Respondent submits that the number of individuals who fall into the same category as Petitioner is so small as not to justify granting certiorari on the laws that this case presents a problem of substantial import to the nation.



## CONCLUSION

For the foregoing reasons, Respondent respectfully prays that the Court deny issuance of a writ of certiorari to review the judgment of the Court of Appeals below, and that the Court not take any action in this case based on the *Baumgartner* case which is totally inapplicable here. In the event that the Court does issue a writ of certiorari herein, Respondent respectfully prays that the Court entertain the question whether the District Court had subject matter jurisdiction of this case in the first instance.

Respectfully submitted,

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